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In The

Supreme Court of the United States

October Term, 1979

No. 79-1791

LARRY C. FLYNT,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

Petitioner, LARRY C. FLYNT, seeks a writ of certiorari to review the judgment of the Georgia Court of Appeals entered on January 15, 1980. Petitioner's application to the Georgia Supreme Court for a writ of certiorari was denied on March 4, 1980.

Opinion Below

The opinion of the Court of Appeals, dated January 15, 1980, is reported at 153 Ga. App. 232 (1980) and is printed in Appendix A. The Georgia Supreme Court's notice of denial of petitioner's application for a writ of certiorari is printed in Appendix B.

Jurisdiction

Larry Flynt was found guilty in the Fulton County (Georgia) State Court of eleven counts of distributing obscene materials in violation of Georgia Code Ann. §26-2101. On March 28, 1979 petitioner was sentenced to a term of imprisonment for a period of twelve months on each of the eleven counts, to be served consecutively, and fined $2,500 on each of the eleven counts. The prison sentence was suspended upon condition that petitioner pay the fine and that he refrain from the sale and distribution of obscene materials in the State of Georgia.

On January 15, 1980 the Court of Appeals of Georgia affirmed the judgment of conviction (153 Ga. App. 232 [1980]). On March 4, 1980 the Supreme Court of Georgia denied petitioner's application for a writ of certiorari.

This petition is seasonably filed within ninety days of the Georgia Supreme Court's denial of writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions and Statutes Involved

The constitutional provisions and statutes involved are contained in our Appendix C.

Questions Presented

1. Can a trial court, in an obscenity prosecution, constitutionally exclude all relevant evidence of community standards (e.g., surveys, expert testimony, and similar magazines sold in the community) which bears directly on the issue of obscenity?

2. Are the magazines *Hustler* and *Chic* constitutionally protected under the First Amendment of the United States Constitution?

The Court has never considered these crucial constitutional questions before.

Statement of Facts

Larry Flynt was convicted in Atlanta, Georgia of distributing eight issues of Hustler Magazine; three issues of *Chic;* and one issue of the *Best of Hustler No. 2.* These magazines enjoy a nationwide distribution. In 1977 *Hustler* had a circulation of over 2,000,000 magazines a month.

During 1978 an indictment was returned in Fulton County, Georgia charging Larry Flynt with eleven counts of distributing obscene literature. The prosecution's entire case in chief consisted of merely introducing into evidence the magazines. No proof was produced, in the prosecution's direct case, that *Hustler* or *Chic* appealed to anyone's prurient interest; exceeded Fulton County's contemporary community standards; or lacked literary, artistic, political, or scientific value. The defense, on the other hand, presented experts who testified that neither *Hustler* nor *Chic* appealed to the average adult's prurient interest and did not lack serious literary value.

John Henry Faulk, whose life story was the subject of the CBS television production "Fear on Trial" and who is presently a member of the cast of the television program "Hee Haw", testified that *Hustler* and *Chic* did not lack serious literary value. Dr. Wardell Pomeroy, one of the country's leading psychologists and co-author of all three of the famous Kinsey Reports, stated that *Hustler* and *Chic* would not appeal to the average person's morbid or shameful interest in sex but instead would produce a natural response. Dr. Lawrence Brannon, a practicing Atlanta psychiatrist, concurred in Dr. Pomeroy's opinion. Larry Flynt testified in his own behalf that a reader study made of Hustler Magazine showed that the average purchaser was between 18 and 34 years of age, a college graduate, and married, with children. However, every attempt to show that *Hustler* and *Chic* did not exceed the contemporary community standards of Fulton County was summarily rejected by the trial court.

Petitioner's Proof of Community Standards

Dr. Charles Winick,* a sociology professor and psychologist at the City University of New York, conducted an extensive opinion poll of Atlanta's adult population. He would have testified, had he been permitted, that the results of this survey of sexual attitudes in Atlanta showed, among other things, that 84% of the population felt adults should be allowed to read magazines dealing with explicit sexual activities if they wished. Seventy-six percent of the population believed that the community standards in Atlanta had changed in recent years to the degree that depictions of nudity and sexual activity were becoming much more publicly acceptable. Dr. Winick has testified as an expert on community standards in obscenity prosecutions in California, Ohio, Georgia, New York, and New Jersey. This is the first case in which his testimony was rejected by a trial judge.

Community Tolerance of *Hustler* and *Chic*

Hustler and *Chic* were distributed in Fulton County by Atlanta News, one of the largest distributors of periodicals on the eastern seaboard. It also distributes *Playboy*, *Penthouse*, *Oui*, *Club*, *Gallery*, *Genesis*, *High Society*, and *Swank*, among other publications. One of the chief executive officers of Atlanta News was prepared to testify about the Fulton County distribution figures of these representative publications sold during the same period of time covered by Larry Flynt's in-

*Dr. Charles Winick has written over 400 articles and is the author of "The New People"; "Television Experience"; and "The Lively Commerce." He has discussed his work on the Merv Griffin, Barbara Walters and Mike Douglas shows. NBC, CBS and ABC have hired him as a consultant. He has testified before a number of Senate Committees on a wide variety of subjects. He conducted two major studies for the President's Commission on Obscenity and Pornography — the only two that dealt with the consumers of sexually oriented materials. In 1978 he conducted a much more intensified study of the Times Square area in New York City under the auspices of a Ford Foundation Grant.

dictment.* This evidence of community standards was received in the federal suit, *Penthouse International Ltd. et al. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), *aff'g* 436 F.Supp. 1241 (N.D. Ga. 1977). The similarity between *Hustler* and these other prominent publications was amply demonstrated by a comparison of the articles, cartoons, and pictures appearing in both sets of journals. For some unexplainable reason, the trial court prohibited the jury from hearing this crucial evidence of "comparables" sold in the Atlanta area.

The Atlanta Library

Attorney Eloise Newhard was not permitted to testify about a survey she made of the sexual books in the Fulton County Public Library. She would have testified about similar publications, available through the library, and books she had purchased at local bookstores and drug stores, all of which materials were comparable to *Hustler* and *Chic*.

A former police officer, Durwood Myers, surveyed Fulton County and found that magazines containing explicit sexual material were widely sold and generally available in the community. He brought with him to court all the publications he purchased at various convenience stores, delicatessens, bookstores and newsstands which were marked with the date, time and location of the purchase. He also prepared a list of all the other stores in the county which sold the very same publications he had purchased. The court disallowed Mr. Myers' testimony. In sum and substance, every effort to demonstrate the community standards of Fulton County was uniformly rejected by the trial court.

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*The statistics established that for the eight months from January 1977 through August 1977 these magazines, comparable to *Hustler*, enjoyed a circulation on a monthly basis of — 28,528 issues of *Penthouse;* 20,767 issues of *Hustler;* 7,123 issues of *Gallery;* 6,223 issues of *Oui;* 5,450 issues of *High Society;* and 1,770 issues of *Genesis*, making a total of 69,861 issues *monthly*.

Reasons for Granting the Writ

I

The First and Fourteenth Amendments bar Larry Flynt's obscenity conviction because the trial court unconstitutionally excluded all relevant evidence of community standards (e.g., surveys, expert testimony, and similar magazines sold in the community) which bears directly on the issue of obscenity.

The critical question presented by this petition is whether the publisher of a national magazine can be convicted of distributing obscene materials when the Georgia trial court has barred all attempts to prove the local community standards. The Georgia Court of Appeals' affirmation of this wholesale denial of due process is in direct defiance of a long line of cases, extending over this Court's history, holding that, in an obscenity case, the defense must be free to introduce evidence bearing on the community standards. *See, e.g., Hamling v. United States*, 418 U.S. 87 (1974); *Kaplan v. California*, 413 U.S. 115 (1973); *Smith v. California*, 361 U.S. 147 (1959). The complete exclusion of all evidence bearing on the issue of community standards, by way of experts, surveys conducted in the community, and comparable evidence, is constitutionally intolerable.

There is no more probative proof in an obscenity case than evidence of the community's acceptance of the challenged material. As the late Mr. Justice Harlan stressed:

> "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process — 'using that term in its primary sense of an opportunity to be heard and to defend [a] substantive right,' . . . requires a state to allow a litigant in some manner to introduce proof on this score" (361 U.S. at 171, 172).

The late Mr. Justice Frankfurter emphasized, in incisive language:

> "[T]he right of one charged with obscenity — a right implicit in the very nature of the legal concept of obscenity — [is] to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process" (361 U.S. at 164, 165).

Clearly, the Georgia courts have directly contravened the national policy of permitting proof of the community standards in an obscenity case.

Many other courts have followed this principle providing objective guidelines to help the jury reach a rational decision under the elusive obscenity formula announced in *Miller v. California*, 413 U.S. 15 (1973).*

Evidence of community standards and comparable materials accepted by the public are important in an obscenity case because often what cannot be articulated can only be expressed

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**See e.g.*, *United States v. Klaw*, 350 F.2d 155, 170 (2d Cir. 1965); *United States v. 392 Copies of a Magazine Entitled "Exclusive"*, 253 F.Supp. 485 (D. Md. 1966), *aff'd*, 373 F.2d 633 (4th Cir. 1967); *In re Harris*, 56 Cal.2d 879, 366 P.2d 305, 15 Cal. Rptr. 889 (1961); *Woodruff v. State*, 11 Md. App. 202, 273 A.2d 436 (1971); *Tudkin v. State*, 229 Md. 223, 182 A.2d 798 (1962); *Commonwealth v. LaLonde*, 447 Pa. 364, 288 A.2d 782 (1972); *In re 7 Magazines*, 268 A.2d 707 (R.I. 1970). The Model Penal Code, §251.4 also embraces this well formed rule.

by means of comparison. Obscenity, as Mr. Justice Harlan stated so well, "is [not] a peculiar *genus* of 'speech and press', . . . as recognizable as poison ivy." (*Roth v. United States*, 354 U.S. 476, 497 (1957) [concurring opinion]).

It is the product of a relationship between society and the material in question, and the issue more precisely is the level of community tolerance than it is the level of the material's intolerability to a particular judge or jury. Since this critical evidence was kept from the jury, *Hustler* and *Chic* were judged in a vacuum. The rule welcoming the admission of comparable publications sold in the community is designed to avoid the very calamity that befell Larry Flynt in this case. Thus, it is imperative that this Court reinforce the rule providing for the admissibility of comparable literature as a means of establishing one aspect of community standards, where as here, the predicate requirement for its introduction was fully met.

In *Womack v. United States*, 294 F.2d 204 (D.C. Cir.), *cert. denied*, 365 U.S. 859 (1961), Judge Prettyman described the necessary foundation as consisting of two elements: "[T]hat the two types are similar . . . and . . . a reasonable degree of community acceptance [of the materials is shown]" (294 F.2d at 206). Here that foundation was easily built. *See also United States v. Womack*, 509 F.2d 368, 376 (D.C. Cir. 1974); *Huffman v. United States*, 470 F.2d 386 (D.C. Cir. 1971); *United States v. Manarite*, 448 F.2d 583 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971); *United States v. West Coast News Co.*, 357 F.2d 885 (6th Cir. 1966), *rev'd sub nom. on other grounds Aday v. United States*, 388 U.S. 447 (1967); *State v. Carlson*, 291 Minn. 368, 192 N.W.2d 421 (1971); *State ex rel. Leis v. William S. Barton Co., Inc.*, 45 Ohio App.2d 249, 344 N.E.2d 342 (1975); *State v. Flynt and Hustler Magazine, Inc.*, No. C-77101 (Ct. App. Ohio, April 4, 1979).

The error committed by the Georgia Court of Appeals in upholding the trial court's refusal to permit Dr. Charles

Winick, Eloise Newhard, Durwood Myers, and Fay McCoy to testify regarding contemporary community standards constitutes a palpable denial of due process. The court's conclusion that petitioner did not lay an adequate foundation for all this proof is unsupported by the record. Larry Flynt did everything possible, considering the legal straitjacket within which the judge had bound defense counsel, to compel introduction of comparable magazines, survey evidence, or testimony as proof of community standards. The proffer of sales figures, actual comparable magazines, and testimony about the presence throughout the entire community of sexually explicit materials satisfied, to a degree rarely seen, the elements of community *acceptance*, or toleration, not mere availability, of the materials.

For example, in holding that the survey evidence was not relevant, the Court of Appeals overlooked the clear direction of Ga. Code Ann. §38-102 that where admissibility of evidence is doubtful, it is to be admitted rather than excluded, and its weight to be left to the jury. However, perhaps the most glaring error occurred when the court affirmed the trial court's erroneous exclusion of the *sales* figures of the comparable magazines distributed by Atlanta News. It ruled that the financial officer's testimony was inadmissible as not being the "best evidence" since the computer records from which the statistics were compiled were destroyed in the ordinary course of business. Defense counsel nevertheless laid a proper foundation by proffering that between 50 and 60 percent of the magazines distributed in Fulton County were *sold* in Fulton County.* The sales figures were further proved when the state caused the reading into evidence of the findings of the civil suit brought by Hustler Magazine against the Fulton County Solicitor General.

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*Even if the records had not been destroyed, Ga. Code Ann. §38-711 would have permitted McCoy's testimony based on a memorandum made in the regular course of business.

Finally, there was a basis for the admission of comparable materials by Durwood Myers' testimony as to actual sales of magazines which he viewed displayed in great numbers in a variety of outlets. The logical inference from the testimonies of both Mrs. Newhard and Mr. Myers was that *sales* of these materials were being made. Since the question was one of weight, not admissibility, their testimonies should have been permitted to be heard by the jury.

In the face of the Georgia Court of Appeals implication that defense counsel had not laid a proper foundation for the admission of comparable materials, we are forced to ask what more could counsel have done? It seems curious that *every single effort* to introduce evidence of contemporary community standards was excluded. A reading of the record reveals that defense counsel certainly did not fail to provide the foundation for *every* admission of the various forms of comparable materials, but in fact, that they established the evidentiary basis in all cases. Nevertheless, the court upheld the unconstitutional exclusion.

Thus, the jury, the sole trier of fact on the crucial issue of contemporary community standards, was denied the right to consider essential evidence on a constitutionally relevant issue. In effect, the trial court licensed the jury to create its own subjective standards for freedom of expression and to disregard the community toleration which in fact exists toward the depiction and representation of sex and nudity in the State of Georgia.

This wholesale exclusion of relevant evidence was the trial court's most grievous error and severely hobbled the defense. No other single error affected more dramatically the outcome of this case. We venture to say that the Georgia decision will have a far-reaching impact on obscenity trials throughout the United States and should be reviewed by this Court. For all the foregoing reasons and authorities, the petition for certiorari should be granted.

II

The magazines *Hustler* and *Chic* are constitutionally protected under the First Amendment of the United States Constitution.

Larry Flynt stands convicted by the Georgia courts of distributing magazines found to be obscene in the constitutional sense. That determination is so patently at odds with the controlling decisions of this Court and is so serious a threat to the continuing vitality of those judgments as to call for immediate corrective action. In affirming Larry Flynt's conviction, the Georgia Court of Appeals has excluded from the public's consideration significant publications which the community is entitled to read, if they so wish.

The Federal Constitution guarantees to everyone the free circulation of literature and only exempts from its protection that material which is hard-core pornography. *Miller v. California, supra; Roth v. United States*, 354 U.S. 476 (1957). Whether a publication is obscene or not raises issues not of historical facts, but questions of constitutional law which must be resolved by an appellate court. As Mr. Justice Brennan wrote in *Jacobellis v. Ohio*, 378 U.S. 184, 188 (1964):

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law."

In *Jenkins v. Georgia*, 418 U.S. 153 (1974), this Court reversed a jury's verdict of obscenity, and in so doing stated:

> "Even though questions of [legal obscenity] are 'essentially questions of fact,' it would be a serious misreading of *Miller* [*Miller v. California, supra*] to conclude that juries have unbridled discretion in determining what is 'patently offensive.' Not only did we there say that 'the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate

> courts to conduct an independent review of constitutional claims when necessary,' . . . but we made it plain that under that holding 'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . .'' (418 U.S. at 160).

Many courts have since acknowledged the appellate obligation expressed in *Jenkins, supra*. *United States v. Marks*, 520 F.2d 913, 923 (6th Cir. 1975), *rev'd*, 430 U.S. 188 (1977); *McKinney v. Parsons*, 513 F.2d 264, 268 (5th Cir.), *cert. denied*, 423 U.S. 960 (1975); *United States v. Groner*, 494 F.2d 499 (5th Cir.), *cert. denied*, 419 U.S. 1010 (1974); *United States v. American Theatre Corp.*, 526 F.2d 48, 49 (8th Cir. 1975), *cert. denied*, 430 U.S. 938 (1977); *Childress v. Municipal Court*, 8 Cal. App.3d 611, 87 Cal. Rptr. 383, 385 (1970); *State v. Onorato*, 3 Conn. Cir. 438, 216 A.2d 859 (1965).

The posture of the issue now before this Court was crystallized by the Ninth Circuit Court of Appeals in *United States v. Cutting*, 538 F.2d 835 (9th Cir. 1976), where the court stated:

> "[I]f it appears that the verdict [that the material is obscene under *Miller, supra,*] is not supported by substantial evidence, a reviewing court has an obligation to set the verdict aside . . ." (538 F.2d at 839).

A review of the evidence leads to the irresistible conclusion that the verdict on the question of obscenity was anything but supported by "substantial evidence." The evidence produced was legally feeble even under this Court's more general definition of obscenity.

The basic guidelines forged by the Court in the now familiar *Miller* decision require that before a publication can be stripped of First Amendment protection, there must be substantial proof of three basic elements. The first element is that the publication as a whole appeals to the average person's morbid or shameful

interest in sex; secondly, that the publication as a whole depicts or describes sexual conduct in a manner which is not accepted or tolerated by the community as a whole; and thirdly, that the publication lacks serious literary, artistic, political or scientific value.

The prosecution chose to produce no evidence during its case in chief on the question of obscenity, and merely relied upon the introduction of the particular magazines and corporate documents into evidence. The defense, on the other hand, produced several witnesses who were without peers in their respective fields. It was only after this testimony that the state called its experts: Fred Crawford, a sociologist; Dr. Jo Cooley, a psychologist who appeared somewhat confused about the meaning of prurient interest; and John Russell, an English literature professor with a most esoteric and rather incomprehensible definition of literary value. The defense experts, however, to a man, forthrightly testified that under the *Miller* definition, objectively applied, the subject publications did not meet the three-pronged *Miller* standard.

The pictures, stories, personal classified ads or any other phase of *Hustler* or *Chic* do not approach the badlands of hardcore pornography and therefore the publications lie beyond the clutches of Georgia's obscenity statute and the *Miller* proscription. It is imperative that the magazines be considered "as a whole." Consequently, to legally censure *Hustler* and *Chic* because less than ten percent of its content may be offensive to some branch of society, is in direct defiance of this Court's test governing obscenity.

The Georgia courts have simply refused — without justification or elaboration — to give effect to this Court's ruling respecting the constitutional right of Larry Flynt to distribute literature, which may be said to be in poor taste, unrefined, trashy or of little educational value, but not obscene in the constitutional sense. *See Hannegan v. Esquire, Inc.*, 327 U.S.

146 (1946). We had thought this Court's ruling in *Jenkins v. Georgia, supra*, was an adequate admonition to the State of Georgia that convictions of this nature, in the First Amendment area, will not be tolerated. However, apparently further instructions are needed.

While this Court cannot be expected to review every obscenity conviction or to reassess every publication found by a state to be obscene, the determination below reflects so egregious a disrespect for this Court's ruling as to justify review and correction of that determination. Moreover, the ruling below will undoubtedly spawn wide scale prosecutions throughout the State of Georgia aimed at other national magazines which will ultimately be repressed. The decision below, in short, will be taken by the Georgia prosecutors as a signal that this Court's prior decisions respecting the First Amendment protection surrounding such magazines no longer need be respected or followed.

The situation is thus one where the Georgia courts and Georgia prosecutors need to be reminded that the constitutional standards and protections of this area have not been relaxed or repealed. Without such reminder from this Court, many individuals will lose their freedom to sell and distribute constitutionally protected literature and will unjustly suffer the stigma of a criminal record. What is more important, if the decision below stands uncorrected, the American public's constitutional right to read what they choose will be impaired and thus a large reservoir of reading material, which this Court has held cannot be constitutionally suppressed, will be jeopardized.

We must never lose our confidence in the American public's ability to reject noxious literature and to be able to sort out the truth from the false in sex, religion, politics or any other field. Sexually-oriented materials should be left to the regulating forces of society. Gresham's law has never prevailed in the

literary world — the bad does not drive out the good. More importantly, the choice of what magazines the people of Atlanta will read for their own amusement, education, or enlightenment must be left to them and not to the state prosecutor. The right to read what we choose must include every magazine, book or newspaper, or in the long run it may include none. For all these reasons, it is respectfully requested that the petition for a writ of certiorari be granted to review the erroneous decision below.

Conclusion

For all these reasons, the Court should grant this petition for certiorari.

May, 1979

Respectfully submitted,

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Appendices

APPENDIX A

OPINION OF THE COURT OF APPEALS OF GEORGIA

JAN 15 1980

SHULMAN, CARLEY, J., CONCURS.
DEEN, C.J., CONCURS SPECIALLY.

58746. FLYNT v. THE STATE C-203

CARLEY, Judge.

Appellant appeals from his conviction on eleven counts of distributing obscene materials, eight issues of *Hustler* magazine and three issues of a magazine entitled *Chic*.

1. Code Ann. §26-2101 prohibits the knowing distribution of obscene materials. Material is obscene if: (1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest — a shameful or morbid interest in nudity, sex or excretion; (2) taken as a whole, it lacks serious literary, artistic, political or scientific value; and (3) it depicts or describes in a patently offensive way, specifically defined sexual conduct. Code Ann. §26-2101(b). In the instant case, the state introduced the eleven magazines into evidence and produced several expert witnesses in rebuttal on the obscenity question. Appellant enumerates as error the exclusion of certain evidence which, he contends, had relevancy to the "contemporary community standards" of Fulton County and whether the eleven magazines he was charged with distributing were or were not violative of those standards.

I. Public Opinion Survey

The trial judge excluded evidence of the results of a public opinion survey. The results of properly conducted public surveys have been admitted into evidence in other jurisdictions.

APPENDIX A
Opinion of the Court of Appeals of Georgia

See, e.g., Zippo Mfg. Co. v. Rogers Imports, Inc., 216 FSupp. 670 (S.D.N.Y. 1963). Assuming without deciding that the results of such surveys are, as a general proposition, admissible into evidence in Georgia as against a hearsay or other objection, it is clear that to be admissible into evidence in the specific case in which their introduction is sought, the survey results "must relate to the questions being tried by the jury and bear upon them either directly or indirectly." Code Ann. §38-201. The survey questions merely inquired as to general opinions concerning the depiction of "nudity and sex," defined as "exposure of the genitals and sexual activity," and whether adults should have the opportunity to obtain such materials. The results of this survey were not relevant to the issue in the instant case — whether the eleven magazines were obscene within the definition of Georgia law. The depiction of "nudity and sex" is not per se obscene. See Jenkins v. Georgia, 418 U.S. 153, 161 (94 SC 2750, 41 LE2d 642) (1974). It is obscene only if the depiction appeals to a shameful or morbid interest in nudity and sex and coalesces with the other elements of Code Ann. §26-2101(b). Whether or not 76 of a 100 persons would say that the change in "standards" over recent years in the depiction of nudity and sexual activities is "more acceptable" does not show that those same persons would find that the eleven magazines in question depicted sex and nudity in an "acceptable" manner. There was no attempt in the survey itself to determine whether the respondents were of the opinion that the contents of the eleven magazines would or would not exceed the limits of permissible candor in the depiction of "nudity and sex." One may be of the opinion that adults have the right to obtain and view materials depicting "nudity and sex" although they would themselves regard the material as exceeding the bounds of "contemporary community standards" and as patently offensive. The survey

asked no more than whether the respondents objected to the dissemination of materials depicting nudity and sex to willing adults, not whether they regarded material such as that depicted in appellant's magazines as obscene in themselves. The survey and expert testimony concerning it were properly excluded. Commonwealth v. Trainor, 374 NE2d 1216 (Mass. 1978); Commonwealth v. Mascolo, 386 NE2d 1311 (Mass. App. 1979).

II. Jury View

The trial court denied appellant's request that the jury be transported around the city of Atlanta in order to view various locations where sexually explicit materials were available. A jury view is a matter within the trial court's discretion. *Sutton v. State*, 237 Ga. 418 (228 SE2d 815) (1976). While the question of a jury view in the context of an obscenity trial apparently has not arisen in this state, other jurisdictions have held that a view such as that proposed by appellant is irrelevant in assisting the jury in reaching an understanding of the contemporary standards held by the average person in the community. See, e.g., Commonwealth v. Mascolo, 375 NE2d 17, 26 (Mass. App. 1978) (cert. denied 439 U.S. 899, ____ SC ____, 58 LE2d 247). The fact that sexually explicit material may be available in certain areas of the city of Atlanta is no indication that the average person, applying contemporary community standards, would not consider the eleven magazines to be obscene. State v. J-R Distributors, Inc., 512 P2d 1049, 1083 (Wash. 1973) (cert. denied 418 U.S. 949, 94 SC 3217, 41 LE2d 1166). The request for a jury view was not erroneously refused.

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III. Comparable Evidence

We now deal with the exclusion of what is termed "comparative" evidence — evidence with which appellant would have the jury compare his magazines in determining their obscenity or nonobscenity. "There has been a considerable amount of confusion in the courts as to the admissibility and function of comparison evidence in obscenity cases. Some jurisdictions have held it reversible error to reject such evidence, while others exclude it rather summarily." U.S. v. Womack, 509 F2d 368, 374 (D.C. Cir. 1974) (cert. denied 422 U.S. 1022, 95 SC 2644, 45 LE2d 681). Thus we perceive the threshold question to be whether "comparable" evidence is admissible in this state in an obscenity case.

"[T]he Fourteenth Amendment does not permit a conviction . . . unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards. The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process — 'using that term in its primary sense of an opportunity to be heard and to defend [a] . . . substantive right,' [Cit.] — requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier." (Emphasis in the original.) Smith v. California, 361 U.S. 147, 171 (80 SC 215, 4 LE2d 205) (1959) (Opinion of Mr. Justice Harlan). The landmark case standing for the proposition that the defendant in an obscenity trial may introduce in his defense comparable materials to those he is charged with distributing is Womack v.

U.S., 294 F2d 204 (D.C. Cir. 1961). "The predicate for a conclusion that a disputed piece of [material] is acceptable under contemporary community standards, as shown by proffered other matter already in unquestioned circulation, must be that the two types of matter are similar. And as another part of his foundation he must show a reasonable degree of community acceptance of works like his own." Womack v. U.S., 294 F2d at 206, supra.

We find the state's argument that the issues of the admissibility of comparable evidence in general and the Womack test in specific have heretofore been considered and rejected in Georgia to be unpersuasive. *Montross v. State*, 72 Ga. 261 (1884), and *Gore v. State*, 79 Ga. App. 696 (54 SE2d 669) (1949), relied upon by the state, were decided prior to the decisions of the United States Supreme Court in Roth v. U.S., 354 U.S. 476 (77 SC 1304, 1 LE2d 1498) (1957), and Miller v. California, 413 U.S. 15 (93 SC 2607, 37 LE2d 419) (1973). It was initially the Roth decision and, subsequently, the Miller decision which established "contemporary community standards" as an element in the determination of obscenity. And it is those standards which the defendant in an obscenity case seeks to establish by the introduction of comparable evidence. Womack v. U.S., 294 FSupp. 204, supra. The rationale behind the admission of "comparative" evidence is to allow the defendant in an obscenity case the opportunity to attempt to persuade the trier of fact that the challenged material does not exceed contemporary community standards, as represented by the comparable material and against which the challenged material is judged. The comparative material is tangible evidence of contemporary community standards. U.S. v. Womack, 509 F2d 368, supra. And *Dumas v. State*, 131 Ga.

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App. 79 (205 SE2d 119) (1974) held only that magazines and publications were not erroneously excluded from evidence in the trial of one charged with distributing obscene medallions. We do not view *Dumas* as a rejection of the right of a defendant in an obscenity case to introduce comparable evidence, as that evidence is defined in Womack. Rather, it is clear that the excluded evidence in *Dumas* — magazines — would not have satisfied the Womack requirement that the proffered evidence must be "similar" to the alleged obscene material — medallions.

Nor are we persuaded by the state's arguments that we should, in the instant case, reject the right of a defendant in an obscenity trial to introduce evidence which meets the Womack requirements. Such evidence would not be irrelevant. It would show "community acceptance" of material "similar" to that distributed by the defendant and thus would have bearing on the issue before the jury — whether the defendant knowingly distributed obscene material. "Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity [Cit.], it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.' " Smith v. California, 361 U.S. at 165, supra. (Opinion of Mr. Justice Frankfurter.)

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We also find without merit the state's contention that the right to introduce comparable evidence, as defined in Womack, should be rejected for reasons of "trial economy." While expert testimony as to the nonobscenity of the challenged material may be before the jury, *tangible* evidence, in the form of similar material accepted in the community, should not be denied the defendant or the jury in an obscenity case on the grounds that it is cumulative. If the trial judge is given discretion in the *amount* of comparable evidence that will be admitted, and we believe he should be given such discretion, there is no reason why the trial should become unmanageably complex and lengthy. U.S. v. Womack, 509 F2d at 378, supra.

Since it is "the right of one charged with obscenity — a right implicit in the very nature of the legal concept of obscenity — to enlighten the judgment of the tribunal, be it the jury or . . . the judge, regarding the prevailing literary and moral community standards," Smith v. California, 361 U.S. at 164, supra, (Opinion of Mr. Justice Frankfurter), we are persuaded that evidence which satisfies the Womack test is relevant, probative evidence which should be admitted in an obscenity trial for the consideration of the trier of fact. We hereby adopt this test in Georgia. "[The Womack test] merely requires an adequate foundation to be laid for the introduction of comparison evidence. Since the issue at hand is the nature of contemporary community standards with respect to 'works like his own,' in order for there to be a rational basis for its admission there must be a showing that the proffered evidence (1) is similar to his own, and (2) enjoys a reasonable degree of community acceptance. The burden is on the defendant and in the absence of such a showing, the evidence must be excluded as lacking sufficient probative value." U.S. v. Womack, 509 F2d at 377, supra.

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(a) *Magazines and Books Purchased by Witnesses.* Turning now to the evidence excluded in the instant case, we must decide whether the Womack test for admissibility was satisfied and whether the evidence was thus erroneously excluded. The first exclusion of so-called comparable evidence occurred when appellant called as his witness a private investigator who had conducted his own personal survey of sexually explicit materials. His testimony concerning the results of this survey, through which he sought to show community standards, was excluded, as were various magazines he had purchased in the course of his investigation. Exclusion of this witness' testimony and the magazines was not erroneous. Even assuming without deciding that the excluded material was "similar" to that appellant was charged with distributing, there was no evidence as to the community "acceptance" of the material. The only testimony was that the witness had purchased the magazines at stated times and places and had personally observed some sales to others. "Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance . . . Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities." U.S. v. Manarite, 448 F2d 583, 593 (2d Cir. 1971) (cert. denied 404 U.S. 947, 92 SC 281, 30 LE2d 264). Likewise, the exclusion of several books and magazines purchased by another witness in local bookstores and drugstores was not erroneous. Here too the proffer of evidence was to their "mere availability" rather than to "a reasonable degree of community acceptance" of the materials.

(b) *Library Materials.* Photocopies of excerpted parts of sexually explicit books available in the local library were excluded from evidence. Though we are not prepared to so hold, even assuming that materials, because they are located in the local library, are, for that reason alone, "reasonably accepted by the community," and that photocopies rather than originals would otherwise be admissible under our "best evidence" rule, Code Ann. §38-203, we do determine that photocopies of *parts* of books available at the local library would not satisfy the "similarity" foundation required under Womack. In determining the obscenity or nonobscenity of appellant's magazines they must be "taken as a whole" and, therefore, comparative evidence must also be proffered "as a whole" to satisfy the defendant's burden under Womack of demonstrating that the comparable evidence is "similar" to his challenged material. U.S. v. West Coast News Co., 228 FSupp. 171, 200 (W.D. Mich. 1964) (rev'd sub nom. on other grounds Aday v. U.S., 388 U.S. 447, 87 SC 2095, 18 LE2d 1309).

(c) *Movie Advertisements.* Testimony regarding a witness' record of the titles of adult movies advertised in the local newspapers was properly excluded. First, we fail to see how mere *advertisements* for films are "similar" to magazines. Cf. *Dumas v. State*, 131 Ga. App. 79, supra. Secondly, advertisements would show only that these films were merely "available," not necessarily "accepted," in the community. Finally, our adoption of the Womack test does not eliminate the otherwise valid, rational rules governing the admissibility of evidence and, therefore, even assuming a record kept by the witness of the titles of adult movies would satisfy the Womack test for relevancy and probaty, such a record would not be the "best evidence" of the advertisements themselves. *Schley v. Rutherford*, 6 Ga. 530 (6) (1849); *Barrett v. Butler*, 54 Ga. 581 (1875).

(d) *Magazines Distributed by Atlanta News Agency.* Also excluded from evidence were several magazines distributed by the Atlanta News Agency, Inc. The witness whose testimony was the vehicle by which appellant attempted to lay the Womack foundation for the proffer of this evidence was the chief financial officer of the corporate-distributor. While the witness was unable to testify from personal knowledge as to the contents of the "comparable" magazines and thus was unable to testify as to their similarity to the eleven magazines in issue, appellant's attorneys had marked each issue with references which showed such similarity. We have reviewed the "comparable" magazines and find that they bear a "reasonable resemblance" to appellant's so as to satisfy the Womack "similarity" foundation. See U.S. v. Pinkus, 579 F2d 1174 (9th Cir. 1978). This witness further testified as to distribution figures for the allegedly comparable magazines to some 324 retail outlets in Fulton County. We view distribution figures — the number of magazines available at newsstands and other outlets — as insufficient evidence of community acceptance to satisfy this element of the Womack foundation. "The defendant in an obscenity prosecution, . . . , is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried. But the availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating . . . [T]he mere fact that materials similar to the [material] at issue here 'are for sale and purchased at bookstores around the country does not make them witnesses of virtue.' [Cit.] . . . 'Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.' [Cit.]" Hamling v. U.S., 418 U.S. 87, 126 (94 SC 2887, 41 LE2d 590) (1974).

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Appellant contends that sales figures, as opposed to mere distribution figures, were proffered and that such evidence of sales meets the Womack "community acceptance" requirement. We agree that sales figures may be used to satisfy the Womack "community acceptance" foundational requirement though "a determination of the precise point at which a publication is so widely sold and is so generally available in the community as to warrant a finding of community acceptance is difficult to fix with assurance." U.S. v. Womack 509 F2d at 379, supra. However, we need not decide whether sales figures for the magazines in the instant case were sufficient to satisfy this requirement because the record does not support appellant's argument that such figures were "offered." When the witness was asked if the distribution figures to which he had testified took into account magazines which were returned to the distributor by the retailers as unsold, he responded that the figures were for distribution and did not reflect any return by the retailers of unsold magazines. When the witness was asked what percentage of the distribution figures represented sales, an objection was made. The witness then responded that there were no detailed sales records as such, that sales figures would have to be "compiled" from the "raw material" that was available at the corporate-distributor's headquarters. The witness was prepared to testify as to his "prior knowledge" of sales figures from "compiling and looking" at the distributor's computer-controlled records. The trial court then indicated that "the records will constitute the highest and best evidence. If he has those records, I will allow him to testify from them." Thereupon, appellant's counsel stated: "[W]e are going to ask [the witness] to go back and get his records and we will put him on at another time." It is thus apparent that the trial court excluded the witness' testimony as to sales figures because it was

not the "best evidence" and that appellant acquiesced in this ruling. Although appellant's counsel — after agreeing to have the witness return with the records — continued to try to convince the trial court to allow the witness to testify from his "prior knowledge" of the records, the judge refused, properly we believe, at that point to allow the witness to testify as to the compilation of the records. Cf. *Blackshear Mfg. Co. v. Harrell*, 191 Ga. 433, 436 (6) (12 SE2d 328) (1940).

Appellant's counsel did not, however, follow the procedure he himself had suggested. Counsel attempted to make a proffer of the witness' testimony, by stating later that afternoon: "If [the witness] would have been permitted to testify, he would have testified as follows: that based upon the distribution figures that he testified to here this morning it would be his judgment and recollection that between fifty and sixty percent of the magazines distributed in Fulton County were sold in Fulton County. That his recollection in that regard would be based upon the information that he actually reviewed when he compiled the distribution figures which he read here this morning and we marked as exhibits. And he would further testify — and this was the important point I was trying to raise this morning — that there are in fact no existing records which demonstrate the actual sales of these magazines in Fulton County. Those sales records were destroyed in the ordinary course of business of Atlanta News Agency, and that therefore there is no best evidence, that being the records; that he was the best evidence of the information that existed at this particular time." After this "proffer" the trial court continued to refuse to allow the magazines into evidence.

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We do not view this proffer by appellant's counsel as a procedurally sufficient "offer" of evidence of sales figures so as to satisfy the "community acceptance" foundation of the Womack test for admissibility. When the testimony of the witness was originally offered as to sales figures, it was refused as not being the "best evidence" and this ruling was acquiesced in by appellant's counsel. Although it was agreed that the witness would be recalled, no such recall was ever made and there was no explanation given as to why this was not done. Thus the testimony of the witness himself was never tendered as the "best evidence" of sales figures. *Holley v. Lawrence*, 194 Ga. 529, 532 (22 SE2d 154) (1942); *Stanley v. Stanley*, 138 Ga. App. 560 (226 SE2d 800) (1976). No pertinent question as to sales figures was ever propounded to the witness after a showing that his testimony would be the "best evidence" thereof. *Thompson v. Hill*, 143 Ga. App. 272 (238 SE2d 270) (1977); *Williams v. Tribble*, 140 Ga. App. 390 (231 SE2d 105) (1976); *Seaboard Air Line R. v. Vaughn*, 19 Ga. App. 397, 398 (2) (91 SE2d 516) (1916). The only "offer" of this witness' testimony as the "best evidence" of sales figures was the unsworn statement of appellant's counsel, made when the witness was not on the stand. We consider this as insufficient offer of this witness' testimony. See 88 CJS, Trials, §§79, 81, pp. 183, 186. Rather, on these facts, it appears that the testimony of the witness was excluded as not the "best evidence," appellant agreed to have the witness return with that evidence, and, instead of recalling the witness to the stand to explain why his "knowledge" of sales figures was the "best evidence" and to tender his testimony, counsel attempted to do so. Since the witness himself did not testify that the records had been destroyed, he was not made available for cross-examination as to when, where, why or how

the destruction had taken place. Therefore, there was no proper "offer" of evidence as to sales of the "comparable" materials and no error in excluding them from evidence. *Watts v. Six Flags Over Ga.*, 140 Ga. App. 106, 108 (4) (230 SE2d 34) (1976).

Appellant further contends that sales figures for the comparable magazines were introduced into evidence when the order of a federal judge was read into evidence by the state. The record apparently does not contain a copy of this order which was read into evidence. The transcript is hopelessly unclear as to whether the "figures" contained in the federal judge's order represented net sales figures of the magazines in Fulton County or are merely distribution figures representing the number of magazines "sold" by the distributor to retailers and thus reflect mere availability. Furthermore, "[T]he judgment in a civil action is not admissible in a criminal action to prove any fact determined in the civil action." Agnor's Georgia Evidence. Hearsay, §11-46, p. 266 (1976); Green, The Georgia Law of Evidence, §318, p. 630 (1957). Pretermitting any other deficiency in this "evidence" to satisfy the Womack "acceptance" foundational requirement, the order of the federal judge as to these "figures" was hearsay and without probative value. Cf. *Goldberg v. State*, 150 Ga. 59 (103 SE 90) (1920).

It is thus clear that insofar as the Womack foundation for the introduction of the comparable magazines distributed by the Atlanta News Agency is concerned, the sole competent and probative testimony was that a certain specified number of such issues of the magazines were distributed to 324 retail outlets in Fulton County and were thus "available" to be purchased. This is insufficient evidence of "a reasonable degree" of the magazines' acceptance in the community to satisfy the Womack test. See Hamling v. U.S., 418 U.S. 87, 127, supra. The

magazines were, therefore, properly "excluded as lacking sufficient probative value." U.S. v. Womack, 509 F2d at 377, supra.

2. Appellant urges that several remarks by the district attorney during his closing argument were improper. Having carefully reviewed each of these statements, we conclude that the remarks were not improper for any of the reasons urged.

"A district attorney 'may argue to the jury the necessity for enforcement of the law and may impress on the jury, with considerable latitude in imagery and illustration, its responsibility in this regard.' [Cit.]. The statements made here appear innocuous in comparison with remarks held to be within permissible bounds in cases such as *Patterson v. State*, 124 Ga. 408, 409 (52 SE 534) [1905], *Brand v. Wofford*, 230 Ga. 750, 754 (9) (199 SE2d 231) [1973], and *Jackson v. State*, 219 Ga. 819, 821 (136 SE2d 375) [1964]. 'Flights of oratory and false logic do not call for mistrials or rebuke. It is the introduction of facts not in evidence that requires the application of such remedies.' [Cit.] 'It is not objectionable for counsel to embellish the argument with figurative speech, provided prejudicial facts extrinsic of the record are not introduced.' [Cits.] The statements here did not involve matters extraneous to the evidence presented. Accordingly, we find no error." *Bryan v. State*, 137 Ga. App. 169, 174 (223 SE2d 219) (1976).

3. Appellant enumerates as error the state's recall of a witness after the close of the evidence and the trial court's reopening of the case to allow her to testify. This witness, an expert first called by the state in rebuttal, had originally testified, to the apparent surprise of the state, that in her opinion the eleven magazines in issue did not, "generally speaking," appeal predominantly to the prurient interest of the

average adult in Fulton County. After the close of evidence, this witness informed the district attorney that she had misunderstood the question and that her answer did not represent her true feelings. Based upon this, the trial court reopened the case and allowed the witness to be recalled. On recall, the witness testified that the reaction of the average adult in Fulton County upon examining the eleven magazines would be "a sense of lust . . . a shameful, unwholesome sense."

In analyzing whether this procedure was erroneous, we must begin with the general proposition that the trial judge is clothed with a very broad discretion in the matter of allowing additional evidence at any stage of a trial, and his decision in this regard will not be interfered with except where it appears there has been an abuse of this discretion. *Johnson v. State*, 164 Ga. 47 (137 SE 553) (1927); *Goldberg v. State*, 22 Ga. App. 122 (95 SE 541) (1918). This discretion extends to allowing the state to reopen the case and recall a witness for the purpose of amplifying testimony previously given. *Sims v. State*, 195 Ga. 485, 490 (6) (25 SE2d 1) (1943). This discretion also extends to allowing a witness to be recalled, after the close of evidence, to correct his former testimony, which he contends was mistaken. *Walker v. Walker*, 14 Ga. 242 (7), 251 (1853). There being no abuse of discretion by the trial judge in the instant case, there was no error.

4. Appellant contests the sufficiency of the evidence, contending that the eleven magazines are not obscene as a matter of law. In accordance with *Dyke v. State*, 232 Ga. 817, 821 (209 SE2d 166) (1974), we have made an independent appellate review of the material to decide the constitutional fact of obscenity. The magazines come within the definition of Code Ann. §26-2101. *Dobbs v. State*, 145 Ga. App. 14 (243 SE2d 275) (1978).

5. Appellant attacks the sufficiency of the evidence to show that he distributed obscene material in Fulton County. Appellant stipulated that he was the editor and publisher of the eleven magazines, that he was aware of and responsible for the contents and materials contained therein, and that all eleven magazines had been sold in Fulton County, three of them by appellant personally. This supports the finding that appellant "distributed" or at least "aided and abetted" in the distribution of the eleven magazines. *Dyke v. State*, 232 Ga. 817, 822, supra; *Allen v. State*, 144 Ga. App. 233, 234 (3) (240 SE2d 754) (1977). There was no error.

6. At the conclusion of the court's charge, the jury left to begin their deliberations. Almost immediately the bailiff returned and announced that the jury wanted the "big chart." This was an apparent reference to a chart which contained the wording of the Georgia obscenity statute, Code Ann. §26-2101. The trial court informed the bailiff to "Tell them it is not evidence and they are not entitled to see it." Appellant urges that this was error — that the request of the jury indicated they were confused and in doubt as to the law and that the trial court should have recharged them on the obscenity statute.

This argument is meritless. "*When the jury requests* the court to recharge them on any point, it is the court's duty to do so. [Cits.]" (Emphasis supplied.) *Edwards v. State*, 233 Ga. 625 (2) (212 SE2d 802) (1975). Clearly the jury's request for the "big chart," without more, does not indicate that they were confused or in doubt as to the law of obscenity or that they wished to be reinstructed on that point. If they were confused and wished to be reinstructed, they would, no doubt, have so requested after being informed that the "big chart" was not available to them during their deliberation. They made no such request. Compare

Freeman v. State, 142 Ga. App. 293, 294 (4) (235 SE2d 560) (1977); *Carter v. State*, 142 Ga. App. 351, 352 (5) (235 SE2d 750) (1977). There was no error.

7. Appellant enumerates as error the denial of his motion to quash and dismiss the indictment on the ground that Code Ann. §26-2101 "as drawn, construed, and applied, is repugnant to the First and Fourteenth Amendments to the United States Constitution." It is urged that Code Ann. §26-2101(e) violates the Equal Protection Clause in that it provides an affirmative defense to a charge of distributing obscene materials if they were disseminated to one associated with an institution of higher learning teaching or studying such materials or to one whose receipt of such materials was authorized in writing by a licensed medical practitioner or psychiatrist. The argument is that this classification, which would provide a defense to some distributors of obscene materials but not to others, such as appellant, charged with violating Code Ann. §26-2101, does not further an appropriate state interest and is, therefore, unconstitutional as violative of the Equal Protection Clause. See, e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (36 LE2d 16, 93 SC 1278) (1973).

This argument is without merit. States have a legitimate interest in controlling the commercial distribution and exploitation of obscenity. Stanley v. Georgia, 394 U.S. 557 (22 LE2d 542, 89 SC 1243) (1969); Miller v. California, 413 U.S. 15, supra; Paris Adult Theater I v. Slaton, 413 U.S. 49 (93 SC 2628, 37 LE2d 446) (1973). Code Ann. §26-2101(e), which would provide a defense to a charge of distributing obscene material by persons who did so in a *non-commercial* manner, i.e., for education or medical reasons, is clearly within the ambit

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of the state's constitutional power to control the commercial dissemination of such material. Therefore, the fact that appellant, the publisher and editor of the eleven magazines at issue, is afforded no defense under the statute for his commercial distribution of the material, would not invalidate the state framework for controlling obscenity. Under present authorities, we conclude that Code Ann. §26-2101 is immune from appellant's constitutional challenge. *Pierce v. State*, 239 Ga. 844 (239 SE2d 28) (1977).

Judgment affirmed. Shulman, J., concurs. Deen, C.J., concurs specially.

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DEEN, Chief Judge, concurring specially.

While I concur and agree with all that is said in Divisions 2, 3, 4, 5, 6, 7 and Sections I and II of Division 1 of the majority opinion, exception must be taken as to some of the conclusions contained in Section III of Division 1. Additionally, I would like to comment on the holding in Division 4.

I.

COMPARABLE EVIDENCE

The majority opinion in subsections (a), (b), (c) and (d) of Section III, of Division 1, concludes that the proffered evidence as to similarity and acceptance of alleged comparable evidence in determining contemporary community standards was insufficient. Thus we do not reach the question relating to the wisdom of adoption in Georgia for the first time of what is referred to as "the Womack Test." Further let me add:

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(a) Personal polls or sexual surveys, if approved by the courts, may lead to perplex the jurors as do political polls confound and confuse the voters. In any event, judicial economy might dictate reasonable limitation in this area or else cases involving alleged sexual obscene materials may become inundated and saturated with conflicting sexual surveys.

(b) Permitting complete copies of the many sexually explicit books, "depictions or descriptions of intercourse, masturbation, bestiality, lesbianism and homosexuality," which are located in the local library, varied sex education materials and textbooks used in elementary, high schools and universities submitted for required scrutiny to the trial judge so that the "taken as a whole" test considering "similarity" in determining admissibility could result in unmanageably complex and lengthy proceedings. "Trial economy" must be given serious consideration before adoption of the Womack Test. As an example, one of the most popular and widely used books by educators within curriculum guides throughout the state and nation, in elementary and high schools, is *Values Clarification*, a handbook of practical strategies for teachers and students written by Sidney Simon, Leland W. Howe and Howard Kirschenbaum, 1978, Hart Publishing Co., Inc., New York. This teaching methodology includes 79 strategies used on students. Among the many games of situation ethics of permissiveness include epitaph, obituary, death, suggestions to students to make decisions of fictional homicide and murder, suicide, abortion, euthanasia, sodomy and drugs, and student sexual survey and personal polls such as: "To whom would you tell . . . 3. You have had premarital sexual relations . . . 11. You have considered suicide . . . 13. You smoke marijuana . . .

23. Your method of birth control," pp. 186-187. "35. How do you feel about premarital sex? Virginal or wild-oats." P. 123. Forced-choice ladder questions such as identifying the student's sexual position. "4. Sex — a person who satisfies his/her sex needs without marriage." P. 110. Teachers are urged on page 22 to write for additional materials at: National Humanistic Education Center, 110 Spring Street, Saratoga Springs, New York 12866. What would trial judges do when confronted with materials and books of this type as meeting the test of "similarity"? What if they are confronted with arguments that these books meet the test of "acceptability" since they are used in the public schools of America as techniques in teacher training, curriculum development, and are a part of the curriculum? Flooding the courts with this type of possible comparable evidence would require considerable time of the trial judge deciding questions of admissibility.

(c) Assuming arguendo that "the Womack Test" is adopted would require substantial time of the court in reading and reviewing newspaper advertisements relating to alleged obscene movies. Even if this type evidence is deemed to meet the "similar" test this does not necessarily point to acceptability in the community. It may only reflect the community standards of the editor of the newspaper and possibly a minority view of the ethics and standards within the community of those who enjoy pornography.

(d) The majority opinion has stated: "We have reviewed the 'comparable' magazines and find that they bear a 'reasonable resemblance' to appellant's so as to satisfy the Womack 'similarity foundation.' " The trial judge has a wide discretion in determining similarity even if the Womack Test were adopted. "In this connection it is important to realize that

'slight' variations in format may well produce vastly different consequences in obscenity determinations." United States v. Womack, (U.S.C.A., D.C., 1974), 509 F2d 368-378. "One of the most often attempted and most rarely successful methods of presenting evidence of contemporary community standards is the use of materials comparable to those on trial." Schauer, *The Law of Obscenity* (Washington, D.C.: Bureau of National Affairs, 1976), p. 133. Appellee's arguments in this area have considerable merit:

"*Secondly*, even if this Court refuses to require testimony of similarity a mere cursory examination of the comparables proffered by appellant and the magazines which were found obscene by the instant jury reveals their dissimilarity. Some of the comparables are more explicit — featuring more sex acts — than *Hustler* and *Chic*, whereas others are less explicit in terms of sex acts (e.g. *Penthouse* and *Oui* (TR-770)). Even appellant admits that some of the comparables depict more explicit sex acts than the *Hustlers* or *Chics* involved in this case. (Appt. Br.-20; TR-773, 802). But, in a manner unlike any of the proffered comparables, *Hustler* and *Chic* combine:

(1) implicit and explicit acts of normal heterosexual intercourse (e.g. *Best of Hustler #2* (State's Exhibit 1 (TR-377)), pp. 50, 51);

(2) scatology (e.g. *Best of Hustler #2*, p. 127; *Hustler*, July 1977 (State's Exhibit 3 (TR-377)), p. 15, 45; *Hustler*, August 1977 (State's Exhibit 4 (TR-377), pp. 64, 79, 110; *Hustler*, October 1977 (State's Exhibit 6 (TR-377)), p. 87; *Chic*, October 1977 (State's Exhibit 7 (TR-377)), p. 43; *Hustler*, December 1977 (State's Exhibit 9 (TR-377)), pp. 13, 30, 103; *Hustler*, January 1978 (State's Exhibit 10 (TR-377)), pp. 22, 107);

(3) bestiality (e.g. *Best of Hustler #2*, pp. 4 (woman and dog), 103 (woman and elephant); *Hustler*, June 1977 (State's Exhibit 2 (TR-377)), pp. 18 (woman and cat), 22 (man and dead shark); *Hustler*, September 1977 (State's Exhibit 5 (TR-377)), pp. 32 (woman and gorilla), 73);

(4) morbidity and violence (e.g. *Best of Hustler #2*, p. 86 (cutting off penises); *Hustler*, June 1977, pp. 41, 85; *Hustler*, July 1977, p. 20 (cutting out eyes); *Hustler*, August 1977, p. 94; *Hustler*, September 1977, p. 17; *Hustler*, October 1977, p. 51; *Hustler*, January 1978, pp. 13 (self-help abortion), 22);

(5) inter-racial sex (e.g. *Best of Hustler #2*, pp. 73f.);

(6) sadism/masochism (e.g. *Best of Hustler #2*, pp. 11f. (article on 'Fist Fucking'); *Hustler*, September 1977, pp. 35f.);

(7) child seduction (e.g. *Best of Hustler #2*, pp. 9, 105; *Hustler*, October 1977, p. 63; *Chic*, October 1977, p. 7;

(8) lesbian sexual intercourse (e.g. *Hustler*, July 1977, pp. 29, 30 43f.; *Chic*, January 1978 (State's Exhibit 11 (TR-377)), pp. 61f.);

(9) heterosexual fellatio and cunnilingus (e.g. *Best of Hustler #2*, pp. 48, 76, 77; *Hustler*, January 1978, pp. 37f. (article on 'How to Eat Pussy'); *Chic*, January 1978, pp. 27f.;

(10) pandering advertisements (e.g. *Hustler*, June 1977, p. 98, *Chic*, November 1977 (State's Exhibit 8 (TR-377)), p. 2; *Hustler*, December 1977, p. 38; *Hustler*, January 1978, p. 16); and

(11) in one magazine a scratch-and-sniff centerfold which, when scratched, is supposed to smell like a woman's vagina (*Hustler*, August 1977).

APPENDIX A

Opinion of the Court of Appeals of Georgia

"Moreover, even if this Court finds one or two of the proffered comparables to be similar to the magazines found obscene, it should still affirm the trial court's exclusion inasmuch as the comparables were offered in 3 groups — those testified about by Myers (TR-742), by Newhard (TR-750, 759), and by McCoy (TR-801). Unless all of the comparables in any one group was admissible the entire group was properly excluded. An offer of proof that contains both proper and improper evidence is properly excluded. *Culpepper v. Bower*, 203 Ga. 784 (1948)."

Another example of material in the alleged comparable is comments of humanistic evolutionary science fiction writer, Issac Asimov, contained in *Genesis*, September 1977, "Lecherous Limericks," p. 43:

> "A burglar from Asbury Park
> Made, at college, his sexual mark.
> Getting in the third story
> Of the girl's dormitory
> He was raped seven times in the dark."

The suggested comparables appear to be more animal and race oriented than the magazines and the trial judge did not abuse his discretion in refusing to admit the other magazines distributed by Atlanta News Agency.

Furthermore this court should not hastily abandon the common sense doctrine in obscenity cases. I concur with what Judge Evans wrote in *Feldschneider v. State*, 127 Ga. App. 745, 746 (197 SE2d 184): "It is provided in Code §38-102 that 'presumptive evidence consists of inferences drawn by human experience from the connection of cause and effect, and observations of human conduct.' Thus, jurors are entitled to use their own common sense as intelligent human beings on many questions. They most likely knew what 'contemporary community standards' are as regards the comic book in evidence,

both in Clarke County and in other parts of the State of Georgia, and of the United States. Each of them doubtless had much knowledge of what is going on in this country through news media, radio, television, newspapers, etc. Shakespeare laid the scene of many of his plays in Italy, though he had never visited that country. Thomas E. Watson wrote 'The Story of France' which is highly regarded by the French people, though he never visited France. It is most likely that the jurors found this book, as I do, offensive, utterly without redeeming social value, published for the purpose of appealing to prurient interest in perversion and degeneracy, and an affront to the contemporary community standards of any community anywhere." Although the "utterly without redeeming social value" test has been altered, the common sense approach, as to determining contemporary community standards set forth in *Feldschneider*, supra, has not yet been overruled and may still be used in obscenity cases.

The jury may reject all expert opinion evidence and use their own common sense. ". . . [H]er knowledge would, and ought to, outweigh the opinion of a whole college of physicians, — because theirs is at last opinion — mere opinion . . ." *City of Atlanta v. Champe*, 66 Ga. 659, 663 (1881).

II.

SUFFICIENCY OF EVIDENCE

From an independent appellate review of the material the evidence is ample in deciding the fact of obscenity. In addition to explicit bestiality and other sexual expression obsessions are such random photography as: "More of Jacqueline Kennedy Onassis Nude" — "Butch and his Georgia peach — this pictorial of a black stud (and that is an understatement when you

get an eyefull of his horsecock)" — "Farrah Fawcett nude? A special poster" — "Show me! This is the last word in photographically explicit sex manuals for children" — "Wife swapping on wheels" — A baby fetus with umbilical cord lying in a pool of blood with a mother scolding her daughter, "I'm really sick of picking up after you, Susan." — Editorials by Larry Flynt discussing sex and children stating: "Children are more interested in stuffed animals than in stuffed vaginas . . . The commission on obscenity and pornography determined that children are not affected by pornography simply because they are not interested in it."

Counsel for appellant argues in his brief: "The President's commission on obscenity has concluded that hard-core pornography does not cause an increase in sexual crime or alter the direction of sexual desires or seriously change any attitudes toward sex by the vulgarizing of sex life." Numerous cases could be catalogued providing scientific empirical evidence refuting the commission's conclusions. One of many examples is *Megar v. State*, 144 Ga. App. 564, 568 (1978) wherein porn photos exhibiting sexual sodomy were used as a blueprint to plan and execute a real crime of kidnapping and subsequent sexual sodomy.

Further, fictional mythological evolution is displayed in an article entitled "Chickens" — bodies of picked nude chickens with human heads in the grip of death — an article entitled "Child Abuse in America" written by humanistic fundamentalist theologian James W. Prescott, Ph.D., Board member of the American Humanist Association and an employee of the Child Health and Human Development of the

APPENDIX A

Opinion of the Court of Appeals of Georgia

U.S. Department of Health, Education and Welfare and author of "Abortion or the Unwanted Child: A Choice for the Humanistic Society" seems to recommend premarital and extramarital sex as a way to relieve pressure and tension, thus decreasing child abuse. He states: "Tension must be relieved, whether through the warm intimacy of sexual contact or through brutal acts of senseless violence." He then attacks Judeo-Christian traditional moral values in favor of his religious values of what might be labeled permissive humanism — homosexuality — hedonism and homicide. In the magazine he states: "We must educate Americans to accept physical pleasure and affection . . . sexual information must flow freely . . ." Dr. Prescott as well as many of the 1968 President's Commission on Pornography are active in the A.C.L.U. and in religious humanism. See *The Siecus Circle A Humanist Revolution*, by Claire Chambers, Western Islands, Belmont, Mass. 02178, p. 28. Note *Pierce v. State*, 145 Ga. App. 680, 684 (244 SE2d 589); *Spillers v. State*, 145 Ga. App. 809, 810 (245 SE2d 54). Prescott, as do many libertarians who share his views, objects to anyone who injects his restrictive values on them, but are the first to demand the right to impose their religious morality of permissiveness on all others within the community — shades of Sodom and Gomorrah!

The judgment of the trial court must be affirmed.

APPENDIX B

DENIAL OF WRIT OF CERTIORARI BY SUPREME COURT OF GEORGIA

CLERK'S OFFICE SUPREME COURT OF GEORGIA

Atlanta MAR 04 1980

Dear Sir:

Case No. 36116 Flynt v. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX C

Constitutional Provisions and Statutes Involved

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

Georgia Code Annotated
§26-2101
Distributing obscene materials

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing", as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a

person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation ;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature.

Supreme Court, U.S.
FILED
JUN 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1791

LARRY C. FLYNT,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1.

Did the trial court correctly exclude evidence which was neither relevant nor probative?

2.

Did the Georgia Court of Appeals correctly hold the magazines Hustler and Chic obscene under Miller v. California?

STATEMENT OF THE CASE

Petitioner was convicted in the State Court of Fulton County, Atlanta, Georgia, on eleven counts of distributing obscene material.[1/] During his trial, Petitioner attempted to introduce certain evidence relating to contemporary community standards. Specifically, Petitioner sought to introduce evidence of (1) the results of an opinion poll concerning the attitudes of Fulton County residents toward publications depicting nudity and sex, (2) the distribution of publications similar to Hustler and Chic within Fulton County, (3) the availability of sexually explicit material in the Fulton County libraries and at various other locations within Fulton County, and (4) the availability of sexually explicit material at various locations throughout Fulton County. The evidence was excluded because it was irrelevant to the issues before the court.

The Georgia Court of Appeals affirmed the Petitioner's conviction on January 15, 1980. On March 14, 1980, the Supreme Court of Georgia denied the Petitioner's application for a writ of certiorari.

[1/] Specifically, the obscene material included eight issues of Hustler and three issues of Chic, both magazine publications.

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT CORRECTLY EXCLUDED EVIDENCE WHICH WAS NEITHER RELEVANT NOR PROBATIVE.

For evidence to be relevant and admissible it must "relate to the questions being tried by the jury and bear upon them either directly or indirectly." Ga. Code § 38-201. In the present case, Petitioner failed to establish that the evidence excluded met that test.

OPINION POLLS

The survey conducted by Dr. Charles Winick, which Petitioner sought to introduce into evidence, contained four questions ostensibly related to community standards: (1) "Do you agree or disagree that adults who want to have the right to read and obtain publications depicting nudity and sex?" (2) "Is it all right or not all right for adults who want to to read and obtain publications depicting nudity and sex?" (3) "In your opinion, have standards changed in recent years so that depictions of nudity and sexual activities in movies and publications available only to adults are more acceptable or less acceptable?" and (4) "We have used the words nudity and sex in the preceding questions. What we mean by these terms includes exposure of the genitals and sexual activity. Is that what you understood we meant, or did you think we meant something else?" These questions may be relevant to the issue of whether residents of Fulton County believe

consenting adults should be able to obtain sexually explicit material; they are not relevant to the issue presented in the present case, specifically, whether the eleven magazines are obscene under the test established in Miller v. California, 413 U.S. 15 (1973). As noted by the court in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973), "[t]he sum of experience . . .affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively. . . ." Obscene material is simply not protected by the First Amendment. Miller v. California, 413 U.S. 15, 23 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973). Therefore, in the words of the prosecutor in this case, the questions contained in this particular poll constitute "merely a feeble referendum of whether or not there should be obscenity laws and that is not an issue in this case." (T. 571).

Additionally, these questions inquire into attitudes toward nudity and sex; neither nudity nor sex is per se obscene. Jenkins v. Georgia, 418 U.S. 153, 161 (1974). Under Miller v. California, 413 U.S. 15, 24 (1973), the relevant inquiry is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole appeals to the prurient interest. . . ."

Prurient interest means "a shameful or morbid interest in nudity, sex or excretion." Roth v. United States, 354 U.S. 476, 487 (1957). See also A.L.I. Model Penal Code § 207-10(2) (Tent. Draft No. 6, 1957); Ga. Code Ann. § 26-2101(b)(1). To be obscene, the material must also satisfy two other prongs of the Miller test in that it "depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law. . ." and in that ". . .the work taken as a whole, lacks serious literary, artistic, political or scientific value." 413 U.S. at 24. Generalized questions concerning "nudity and sex" are not relevant to the specific legal issues raised in the present case. Thus, although the results of properly conducted opinion polls have been admitted in certain jurisdictions, see, e.g., Zippo Manufacturing Company v. Rogers Imports, Inc., 216 F.Supp. 670 (S.D. N.Y. 1963), the results of this particular survey were properly excluded. Commonwealth v. Mascolo, 386 N.E.2d 1311 (Mass. App. 1979); Commonwealth v. Trainor, 374 N.E.2d 1216 (Mass. 1978).

THE ATLANTA NEWS AGENCY

Petitioner sought to introduce the testimony of Fay McCoy, the Chief Financial Officer of the Atlanta News Agency, in an effort to establish community acceptance by showing the distribution and availability within Fulton County of magazines similar to Hustler and Chic. Under the test established in United States v. Womack, 509 F.2d 368 (D.C. Cir. 1974), adopted by the Georgia Court of Appeals in Flynt v. The State, 153 Ga. App. 232, 237, ___S.E.2d___(1980), such comparative

evidence is deemed to be relevant, probative, and therefore admissible if the offering party can show that the proffered evidence "(1) is similar. . .[to the material alleged to be obscene] and (2) enjoys a reasonable degree of community acceptance." United States v. Womack, 509 F.2d 368, 377 (D.C. Cir. 1974). Evidence of mere availability, however, is not sufficient to prove that the comparative evidence offered enjoys a reasonable degree of community acceptance. "[T]he mere fact that materials similar to the [material] at issue here 'are for sale and purchased at bookstores around the country does not make them witnesses of virtue.' . . . 'Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.' " Hamling v. United States, 418 U.S. 87, 126 (1974); see United States v. Manarite, 448 F.2d 583, 593 (2nd Cir.), cert. denied, 404 U.S. 947 (1971).

In the present case, the Georgia Court of Appeals found that magazines offered as comparative evidence were indeed similar to the eight issues of Hustler and three issues of Chic. Flynt v. The State, 153 Ga. App. 232, 239, ___S.E.2d___, (1980). On the issue of community acceptance, however, the witness from the Atlanta News Agency could not state that similar magazines which were distributed were actually sold. Since the distribution figures offered did not indicate what percentage of the magazines distributed were returned to the distributor unsold, the Atlanta News Agency testimony was not sufficiently probative to warrant a finding of community acceptance. The evidence merely indicated that similar magazines were available.

The Georgia Court of Appeals agreed that evidence of actual sales may be used to establish community acceptance, but found that no such evidence was offered in the present case. Flynt v. The State, 153 Ga. App. 232, 240, ___S.E.2d___, (1980). The witness from the Atlanta News Agency offered to testify to his prior knowledge of sales figures which was derived from examining the computer records of the Atlanta News Agency. Ga. Code § 38-203 provides "[t]he best evidence which exists of the fact sought to be proved shall be produced unless its absence shall be satisfactorily accounted for." Thus, the computer records themselves would have been the best evidence of sales figures and the trial court made it clear that the sales evidence would have been admitted if the records themselves had been offered. (T. 777-78). Trial counsel for the Petitioner fully understood the trial court's preference for the best evidence and stated "we are going to ask Mr. McCoy [the witness] to go back and get his records and we will put him on at another time." (T. 778). Later that afternoon, however, without questioning the witness again, Petitioner's counsel independently attempted to proffer that the computer records had been destroyed in the ordinary course of business and that therefore the witness' testimony was the best evidence. In order "[t]o complain of exclusion of evidence on direct examination the one who offers the evidence must show 'that a pertinent question was asked, that the court ruled out an answer, that a statement was made to the court at the time showing what the answer would be, and that such testimony was material and would have benefited the complaining party.' . . . (citations omitted)" Thompson v. Hill,

143 Ga. App. 272, 274, 238 S.E.2d 270 (1977).

In the present case, no pertinent question was ever addressed to the witness at a time when his testimony was being offered as the "best evidence." The independent unsworn offer made by counsel for the Petitioner was insufficient to compel the admission of the sales evidence.

THE TESTIMONY OF ATTORNEY ELOISE NEWHARD

The Petitioner attempted to introduce the testimony of attorney Eloise Newhard as to the availability of sexually explicit materials in the Fulton County libraries. Newhard had prepared photocopies of excerpts from various publications. Under Miller v. California, 413 U.S. 15, 24 (1973), "prurient interest" and "literary, artistic, political or scientific value" must be evaluated on the basis of materials "taken as a whole." Publications can hardly be shown to be similar to allegedly obscene materials merely because selected excerpts contain sexually explicit material. Such comparative evidence must also be "taken as a whole." Thus photocopies of parts of books from the Fulton County libraries cannot be used to satisfy the similarity requirement of United States v. Womack, 509 F.2d 368, 377 (D. C. Cir. 1974).

In addition, it is far from clear that just because material is available in public libraries it is reasonably accepted in the community.

Mere availability does not prove that there is community acceptance. Hamling v. United States, 418 U.S. 87, 126 (1974); United States v. Manarite, 448 F.2d 583, 593 (2nd Cir.), cert. denied, 404 U.S. 947 (1971).

Eloise Newhard also sought to testify concerning books she had purchased at Fulton County bookstores and drug stores. Once again, evidence that sexually explicit materials are available does not prove that they are accepted by the community. Hamling v. United States, 418 U.S. 87, 126 (1974); United States v. Manarite, 448 U.S. 947 (1971).

THE TESTIMONY OF DURWOOD MYERS, PRIVATE INVESTIGATOR

Petitioner sought to introduce the evidence of Durwood Myers, a private investigator, who had conducted his own survey of the availability of sexually explicit materials within Fulton County. Even assuming all of the materials surveyed were similar to the issues of Hustler and Chic involved in the present case, Myers' proffered testimony did not establish that such materials are accepted in the community. Like the testimony of attorney Eloise Newhard, Myers' testimony focused on availability as opposed to community acceptance and such testimony is insufficient to lay the foundation required by United States v. Womack, 509 F.2d 368 (D. C. Cir. 1974).

Petitioner was not denied the opportunity to present evidence; he was precluded from placing in the record a myriad of irrelevant material. The trial court correctly excluded that evidence which was neither relevant nor probative.

B. THE GEORGIA COURT OF APPEALS CORRECTLY HELD THE MAGAZINES HUSTLER AND CHIC OBSCENE UNDER MILLER v. CALIFORNIA.

Obscene material is not protected by the First Amendment. Miller v. California, 413 U.S. 15, 23 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973). In determining whether specific material is obscene, three basic factors must be examined: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). The "appeal to prurient interest" and "patent offensiveness" steps of the Miller test must be evaluated by the trier of fact in relation to "contemporary community standards." Smith v. United States, 431 U.S. 291, 300-01 (1977). "Literary, artistic, political or scientific value, on the other hand, is not discussed in Miller in terms of contemporary community standards." Id. at 301.

In order to satisfy the trier of fact that the allegedly obscene material meets the three prong Miller test, the state is not compelled to present expert testimony if the materials themselves are placed into evidence. This Court "has regarded the materials as sufficient in

themselves for the determination of the question. Ginzburg v. United States, 383 U.S. 463, 465 (1966); see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973). It was made clear, however, in Jenkins v. Georgia, 418 U.S. 153 (1974), that juries do not have unbridled discretion in determining, for example, what is patently offensive. As the Court noted, "It would be wholly at odds with this aspect of Miller [the determination of patent offensiveness] to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty." Id. at 161. Thus, Miller has been viewed as requiring appellate courts "to review independently the constitutional fact of obscenity." Id. at 163, (Brennan, J., concurring). Such independent review has been explicitly applied to the last two prongs of the Miller test and implicitly to the first. Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1364 (5th Cir. 1980).

In evaluating the first prong of the Miller test, whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, the State of Georgia has defined "prurient interest" as "a shameful or morbid interest in nudity, sex or excretion." Ga. Code Ann. § 26-2101(b)(1). Compare Roth v. United States, 354 U.S. 476, 487 (1958); A.L.I. Model Penal Code § 207-10(2) (Tent. Draft No. 6, 1957). The "taken as a whole" aspect of this first prong is to be applied in a qualitative rather than a quantitative manner. Ginzburg v. United States, 383 U.S. 463, 466, n. 5 (1966). Thus, in determining whether the

eleven magazines at issue in the present case appeal to a shameful or morbid interest in nudity, sex or excretion, a finding must be "based upon their characteristics as a whole, including their editorial formats, and not upon particular articles contained, digested or excerpted in them." Id. After making an independent appellate review of the magazines involved in this case, the Georgia Court of Appeals found that they did indeed, taken as a whole, appeal to the prurient interest. Flynt v. The State, 153 Ga. App. 232, 246, ___ S.E.2d___ (1980).

The second part of the Miller test examines whether the material depicts or describes, in a patently offensive way, conduct which is specifically defined by relevant state law. The Court in Miller gave examples of what a state may regulate under this "patently offensive" prong of the test. 413 U.S. at 25. Jenkins v. Georgia, 418 U.S. 153, 160 (1974), contains examples of what juries might find to be patently offensive: "'representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,' and 'representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'" The Court further noted in Jenkins, 418 U.S. at 160-61, that "[w]hile this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to

such a determination." Accordingly, the Georgia legislature has enumerated depictions and descriptions of the following types of hard core sexual conduct for regulation:

> (i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;
>
> (ii) acts of masturbation;
>
> (iii) acts involving excretory functions or lewd exhibition of the genitals;
>
> (iv) acts of bestiality or the fondling of sex organs of animals;
>
> (v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

Ga. Code Ann. § 26-2101(b)(3).

The record speaks for itself as to the existence of depictions and descriptions of such sexual acts. Examples include a picture of a woman being mounted by a dog from the rear (T. 612), an article describing "how a person can masturbate of woman with his fist." (T. 619), a picture of a man inserting his penis into the mouth of a dead shark with accompanying commentary which speaks of men "who crave sex from sharks" (T. 630) and a variety of material focusing on an interest in excrement. (T. 822-23).

The final prong of the Miller test examines "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Once again, the "taken as a whole" aspect of this examination must be conducted on a qualitative as opposed to a quantitative basis. Ginzburg v. United States, 383 U.S. 463, 466, n.5 (1966). If the other two prongs of the Miller test are satisfied "even one obscene item contained in a work would be sufficient to support a finding that the entire publication is obscene if "taken as a whole", the publication lacks serious value." Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1363, 1368 (5th Cir. 1980). In the present case, after making an independent review of the contents of the eleven magazines in question, the Georgia Court of Appeals found that they did indeed lack serious literary, artistic, political or scientific value. Flynt v. The State, 153 Ga. App. 232, 245, ___S.E.2d ___(1980). That court correctly applied the standards delineated by this Court in Miller v. California, supra, in finding the magazines in question obscene and in violation of Georgia law.

CONCLUSION

No sufficient reason having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served three copies of this Brief for Respondent in Opposition upon the Petitioner by depositing three copies of the Brief in the United States mail, with proper address and adequate postage to:

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This 20th day of June, 1980.

/s/
JOHN C. WALDEN